2016 IL App (1st) 140930-U
No. 1-14-0930

THIRD DIVISION
March 30, 2016

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

MADISON MANOR II CONDOMINIUM ASSOCIATION, Plaintiff-Appellee and Cross-Appellant, v. JERZY SENDOREK and ANNA WELNOWSKA, Defendants-Appellants and Cross-Appellees.	)	Appeal from the Circuit Court of Cook County. No. 13 M1 708469 The Honorable Leonard Murray, Judge Presiding.

JUSTICE PUCINSKI delivered the judgment of the court.
Presiding Justice Mason and Justice Lavin concurred in the judgment.

ORDER

¶ 1 *Held:* The circuit court abused its discretion in granting condominium association's motion for voluntary dismissal as to monetary damages claim. The circuit court improperly determined that association failed to present sufficient evidence to establish a claim for possession.

¶ 2 This appeal arises out of a forcible entry and detainer action filed by a condominium association against the unit owners based on unpaid assessments. The circuit court granted the owner's motion for a directed finding as to the association's claim for possession, but denied the owners' motion as to the association's claim for monetary damages. The court also granted the

association's motion for voluntary dismissal. The unit owners appeal from the court's order and the association cross-appeals. For the following reasons, we reverse the circuit court and remand with instructions.

¶ 3 BACKGROUND

¶ 4 Plaintiff-Appellee-Cross-Appellant, Madison Manor II Condominium Association (the Association) is the condominium association for Madison Manor II. Defendants-Appellants-Cross-Appellees, Jerzy Sendorek and Anna Welnowska (the Owners) are owners of condominium Unit C-7 at Madison Manor II located at 920 W. Madison in Chicago. Westward Management Inc. (Westward) is the management company retained by the Association to manage aspects of the subject property.

¶ 5 The Association filed its one-count complaint against the Owners in the circuit court of Cook County, on April 12, 2013, under the Forcible Entry and Detainer Act (forcible statute) (735 ILCS 5/9 (West 2012)), and the Condominium Property Act (Act) (765 ILCS 605 (West 2012)). The Association alleged that the Owners had failed to pay monthly assessments for several preceding months, and sought a money judgment and an order for possession. Attached to the complaint was a written notice of the delinquency and demand for possession sent to the Owners on February 6, 2013.

¶ 6 A trial was held on March 19, 2014. The Association presented the testimony of its Board of Director's (Board) president, Kevin Smith (Smith) and an employee of the management company, David Westveer (Westveer). Westveer testified that Westward was the property manager of Madison Manor II, beginning on July 1, 2012.

¶ 7 Westveer testified about provisions contained in the Declaration of Condominium Ownership and Bylaws, Easements, Restrictions, and Covenants. He testified that there are rules

and regulations providing for late fees and reimbursement of expenses incurred regarding any unit owner's default. Specifically, the regulations provided that if assessment payments are not postmarked by the 10th of the month, a unit owner will incur a late fee of $50.

¶ 8 Westveer testified that Sendorek and Welnowska are the owners of record of Unit C-7. Westveer testified that the Owners were delinquent in paying their assessments. Westveer stated that he sent them a notice and demand for possession on February 6, 2013, indicating that as of that date, the Owners had over $2,150.49 in unpaid common expenses, exclusive of any fees or costs of collection and that his office prepared that document at the direction of the Board. The demand required payment in full within 30 days of the date of the mailing of the notice or the Owners right to possession would be terminated. The Owners did not cure the amount claimed within 30 days. He further testified that as of the trial date $2,553.58 remained due and owing for the unpaid common expenses and late fees, exclusive of attorney's fees and court costs.

¶ 9 Next, Smith testified that he has been a unit owner at Madison Manor II since 2004. He became a Board member of the Association in 2012, and was elected treasurer. He was re-elected to the Board in February, 2014, and is now the president. Smith testified that as treasurer of the board he had access to unit owner's accounts and balances. Smith stated that collection proceedings start when a unit owner's balance exceeds $1,000, after which a 30-day demand letter is sent to the unit owner. Smith further testified that Westward gets Board approval on all stages of collection proceedings.

¶ 10 At this juncture, the Association rested its case, and the Owners moved for a directed finding pursuant to section 2-1110 of the Code of Civil Procedure (Code) (735 ILCS 5/2-1110 (West 2012). The Owners claimed that none of the Association's exhibits had been admitted into evidence and that the Association had not proved its case. The circuit court held that although

there was testimony that the requisite notice had been served, the "actual notice was not in evidence" and the court indicated "that the notice itself was required documentary evidence in order to maintain a claim for possession." Based on that determination, the court granted the Owners' motion for a directed finding as to the Association's claim for possession.

¶ 11 The court denied the Owners' motion for directed finding as to the Association's claim for monetary damages. The court found that Westveer had provided testimony based on his first hand knowledge regarding the status of the Owners' account and payments made while Westwood had managed Madison Manor II. The court specifically stated "there is testimony about a balance owed at this point."

¶ 12 Thereafter, the Association orally moved for a voluntary dismissal under section 2-1009 of the Code. 735 ILCS 5/2-1009 (West 2012). Over the Owners' objection, the circuit court granted the dismissal without prejudice and ordered that the Association was required to pay the costs related to the dismissal. The Owners timely appeal from the court's order denying their motion for a directed finding as to monetary damages and the court's order granting the Association's motion for a voluntary dismissal. The Association cross-appeals from the court's order granting the Owners' motion for a directed finding as to its claim for possession.

¶ 13 ANALYSIS

¶ 14 On appeal, the Owners contend that the court erred in allowing the Association to voluntarily dismiss its monetary damages claim. The Owners also argue that the circuit court erred in making a directed finding and entering judgment in favor of the Owners on possession only, and not on the entirety of the sole count in the complaint. Additionally, the Owners argue that there was insufficient evidence for the court to find that the Association established a *prima facie* case for monetary damages. Lastly, the Owners argue that the court erred in denying their

motion for a directed finding for monetary damages because the court did not comply with the proper analysis.

¶ 15 The Association responds that the circuit court did not abuse its discretion in allowing a voluntary dismissal because the Association was ordered to tender costs to the Owners and the Owners had not identified any prejudice. The Association maintains that the forcible statute does not require separate counts and it was proper for the court to separately address the claims for possession and monetary damages. The Association argues that it provided sufficient evidence for the court to find a *prima facie* case for monetary damages. The Association contends the court complied with the proper analysis and correctly found it survived a motion for a directed finding as to its monetary damages claim. On cross-appeal, the Association asserts that it was error for the court to grant a directed finding for the Owners as to possession.

¶ 16 Our review of the parties' arguments and the legal issues before us require consideration of several statutes. The Act expressly provides that a condominium board of managers has the right to maintain an action for possession against any defaulting unit owner in the manner provided by the forcible statute. 765 ILCS 605/9.2 (West 2012). An action of forcible entry and detainer may be maintained against a unit owner for failure of the unit owner to pay his or her share of the common expenses. 735 ILCS 5/9-102 (West 2012). A notice of the demand shall give the purchaser under such contract, or to the condominium unit owner, as the case may be, at least 30 days to satisfy the terms of the demand before such action is filed. * * * (c) The demand set forth in subsection (a) of this Section shall be served either personally upon the purchaser or condominium unit owner or by sending the demand thereof by registered or certified mail with return receipt requested to the last known address of such purchaser or condominium unit owner * * *. 735 ILCS 5/9-104.1 (West 2012).

¶ 17 When the legislature added condominium property to the reach of the forcible statute, the legislature likewise provided that when an action is based upon the failure of a unit owner to pay his or her share of the common expenses, or of any other expenses lawfully agreed upon, the association may obtain a judgment both for possession and the unpaid expenses found due by the court. 735 ILCS 5/9-111(a) (West 2012); *Spanish Court Two Condominium Association v. Carlson*, 2014 IL 115342, ¶ 15.

¶ 18 Section 9-111 of the forcible statute states in pertinent part:

"If the court finds that the expenses and fines are due to the plaintiff, the plaintiff shall be entitled to the possession of the whole of the premises claimed, and judgment in favor of the plaintiff shall be entered for possession thereof and for the amount found due by the court including interest and late charges, if any, together with reasonable attorney fees, if any, and for the plaintiff's costs." 735 ILCS 5/9-111(a) (West 2012).

¶ 19 The construction of a statute is a question of law that is reviewed *de novo*. *In re Andrew B.*, 237 Ill. 2d 340, 348 (2010). The primary goal in construing a statute is to ascertain and give effect to the intent of the legislature. *Slepicka v. Illinois Department of Public Health*, 2014 IL 116927, ¶ 14. The most reliable indicator of legislative intent is the language of the statute, given its plain and ordinary meaning. *Id*. Further, when a statute defines the very terms it uses, those terms must be construed according to the definitions contained in the statute. *State Farm Mutual Automobile Insurance Co. v. Universal Underwriters Group*, 182 Ill. 2d 240, 244 (1998). Also, a court presumes the General Assembly, in its enactment of legislation, did not intend absurdity, inconvenience, or injustice. *Land v. Board of Education of the City of Chicago*, 202 Ill. 2d 414, 402 (2002).

¶ 20 We now turn to the Owners' first argument on appeal that the circuit court erred in granting the Association's motion for a voluntary dismissal as to its monetary damages claim under section 2-1009 of the Code. 735 ILCS 5/2-1009 (West 2012). The Owners contend that the court abused its discretion in granting the Association's voluntary dismissal. The Owners argue that the dismissal was improper because the motion was made *sua sponte* and they were not provided with the requisite notice. The Owners also rely on the fact that the Association did not comply with the procedural requirements of section 2-1009 of the Code. 735 ILCS 5/2-1009 (West 2012).

¶ 21 Section 2-1009(a) of the Code provides in pertinent part that a plaintiff may voluntarily dismiss its action without prejudice at any time before trial or hearing begins, upon the giving of notice to each party of record and the payment of cost. "After trial or hearing begins, the plaintiff may dismiss, only on terms fixed by the court (1) upon filing a stipulation to that effect signed by the defendant, or (2) on motion specifying the ground for dismissal, which shall be supported by affidavit or other proof." 735 ILCS 5/2-1009(a), (c) (West 2012).

¶ 22 The Owners argue that the conditions for voluntary dismissal after trial commences were enacted to correct abuses possible under a predecessor statute, which allowed a plaintiff who feared an unfavorable result to voluntarily dismiss the proceedings at any time before the jury retired or in a bench trial, before the case was submitted for decision. The Owners maintain that since the Association rested its case prior to seeking to voluntarily dismiss its money damages claim, the Association did not have an unfettered right to nonsuit its claim pursuant to 2-1009 (a), but could only seek a voluntary dismissal under 2-1009(c). 735 ILCS 5/2-1009(a)(c) (West 2012).

¶ 23 The Owners contend that the record is devoid of a motion by the Association indicating grounds for dismissal, and the Association did not submit an affidavit or other evidence in support of its request for dismissal. The Owners assert that the Association failed in meeting either of the available prerequisites for the court fixing terms for dismissal. The Owners argue that if the Association had not been permitted to voluntarily dismiss its claim, the Owners could have rested without presenting any evidence and likely would have had a judgment entered in their favor.

¶ 24 The Association responds that since there had not been a judgment on the Association's claim for monetary damages, a motion for a voluntary dismissal was viable. Although the Association agrees that there was no notice, they maintain that there was no prejudice to the Owners. Specifically, the Association contends that the Owners had an opportunity to object and the circuit court held that the Association had to pay the costs of the voluntary dismissal.

¶ 25 We disagree with the Association and find that the Owners did suffer prejudice. We note that our supreme court has condemned the use of a voluntary dismissal when sought solely as a means to circumvent the effect of a potentially dispositive motion which could dispose of the case based on its merits. *Gibellina v. Handely,* 127 Ill. 2d 122, 137-38 (1989). Accordingly, the court has endorsed the trial court's determination to deny a plaintiff's motion for a voluntary dismissal, where such motion "was plainly made 'in the face' of a potentially dispositive motion and was used to 'avoid a potential decision on the merits'." *Fumarolo v. Chicago Board of Education*, 142 Ill. 2d 54, 69 (1990) (quoting *Gibellina*, 127 Ill. 2d at 137).

¶ 26 We find that the Owners were prejudiced by the surprise presentation of an oral motion with no documentary support at the close of the Association's case-in-chief. In this case, the voluntary dismissal motion was made without the required notice to the Owners under section 2-

1009 in order to avoid a likely dispositive finding on the merits. 735 ILCS 5/2-1009 (West 2012). We find that these circumstances resulted in substantial prejudice to the Owners, and accordingly, conclude that the court abused its discretion in granting the Association's motion to voluntarily dismiss the money damages claim. We reverse and vacate the order of dismissal. See *Gibrick, v. Skolnik,* 254 Ill. App. 3d 970, 975 (1993) (The circuit court should not be free to grant voluntary dismissal, where its sole purpose would be to avert an unfavorable decision if the trial were to proceed to its conclusion).

¶ 27 On cross-appeal, the Association contends that the circuit court erred in granting the Owners' motion for a finding at the close of the Association's case on its claim for possession. Section 2-1110 of the Code provides that in all cases without a jury, defendant may, at the close of plaintiff's case, move for a finding or judgment in his or her favor. In ruling on the motion the court shall weigh the evidence, considering the credibility of the witnesses and the weight and quality of the evidence. 735 ILCS 5/2-1110 (West 2012).

¶ 28 The Association argues that, contrary to the circuit court's findings that it had not established the requisite service of notice and demand, that it had in fact proven service through the testimony of Westveer and Smith.

¶ 29 In seeking to uphold the circuit court's directed finding, the Owners respond that the Association failed to move to admit any documents into evidence, and therefore, failed to establish a *prima facie* case for possession. According to the Owners, the requisite service of notice and demand was not admitted into evidence and was necessary to maintain a claim for possession. The circuit court agreed.

¶ 30 If the court finds no *prima facie* case, as a matter of law, the standard of review is *de novo*. *527 S. Clinton, LLC v. Westloop Equities, LLC,* 403 Ill. App. 3d 42, 53 (2010).

¶ 31 The Association maintains that the testimony of Westveer established that the notice and demand for possession had been sent to the Owners. Westveer testified that he sent the Owners a notice and demand for possession bearing his signature on February 6, 2013. The notice and demand indicated that the Owners were in arrears in the amount of $2,150.49 for unpaid common expenses. Westveer stated that the Owners did not cure the amount claimed within 30 days. He further testified that his office prepared that document at the direction of the Board.

¶ 32 Smith testified that he was the treasurer and a Board member as of 2012. He testified that Westward gets approval to start collection proceedings when a unit owner's balance exceeds $1,000. He further testified that Westward gets Board approval on all stages of collection proceedings.

¶ 33 The Association relies on *527 S. Clinton*, for the proposition that testimonial evidence can be sufficient to establish a *prima facie* case. 403 Ill. App. At 54. In *527 S. Clinton*, the plaintiff brought a suit seeking judicial declarations that its proposed development of a multi-story commercial and residential building would not violate an easement held by the defendant. *Id.* In support of its claim, the plaintiff presented expert testimony from an architect and a traffic engineer. *Id.* The court found that the plaintiff had presented some evidence and established a *prima facie* case. *Id*. at 55.

¶ 34 Similarly, the Association argues, as in the case of *527 S. Clinton*, it presented competent first-hand testimony sufficient to establish service of notice and demand on the Owners. The Association asserts that it met its burden of proving a *prima facie* case for possession.

¶ 35 In the case at bar, the circuit court determined that in "possession cases you have to have evidence of a proper demand being served. At this point that's not in evidence." The circuit court's order held that "as to [p]laintiff's claim for possession, [p]laintiff has not provided

evidence of service of the requisite notice." As previously noted, none of the Association's exhibits had been admitted into evidence.

¶ 36 We disagree with the circuit court and find that the evidence supported the claim for possession. The testimony of the Association's witnesses established that the Owners were delinquent in the payment of required assessments, a demand had been served on the Owners as required under the forcible statute giving them 30 days to cure, and the delinquency had not been cured. This testimony was sufficient to establish the Association's right to possession. We note that nothing in the forcible statute requires the Association to introduce at trial a copy of the demand. 735 ILCS 5/9-104.1 (West 2012). In any event, a copy of the demand was attached to the Association's verified complaint. The Association's failure to introduce the demand itself, the condo declarations and an itemization of the delinquency would likely have been fatal to its claim had the Owners rested without presenting any evidence, but it did not mandate a finding in the Owners' favor on possession at the close of the Association's case.

¶ 37 In light of the facts and our review of the record, we conclude that the circuit court improperly found that the evidence presented was insufficient to sustain a claim for possession and erred in granting the Owners' motion for a directed finding for possession. Therefore, we reverse the entry of a directed finding on the claim for possession.

¶ 38 Because we are reversing and remanding this case with instructions, we need not address the Owners remaining issues on appeal.

¶ 39 CONCLUSION

¶ 40 Accordingly, for the reasons set forth above, we reverse and remand with instructions to vacate the order of voluntary dismissal and vacate the entry of a directed finding and to commence a new trial.

¶ 41 Reversed and remanded with instructions.